

When Can the Firearm Industry Be Sued?

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There has been increased interest in the scope of the [Protection of Lawful Commerce in Arms Act](#) (PLCAA) after the Connecticut Supreme Court [ruled](#) that a wrongful death lawsuit may go forward against the manufacturer, distributor, and dealer of the semiautomatic rifle used by the assailant in the mass shooting at Sandy Hook Elementary School in Newtown, Connecticut. The PLCAA generally bars lawsuits in federal or state court against firearm manufacturers, distributors, and dealers when a third party acquires a firearm from that distribution chain and uses it for criminal ends. But the plaintiffs in [Soto v. Bushmaster Firearms International](#) contend, and the Connecticut Supreme Court agreed, that the alleged claims fit within one of the PLCAA's enumerated exceptions: when a manufacturer or seller knowingly violates a state or federal law "applicable to" the sale or marketing of firearms, and that violation "was a proximate cause" of the harm the lawsuit seeks to vindicate (known as the "predicate exception"). This Sidebar outlines the PLCAA, explains the *Soto* ruling, and evaluates the impact it may have on future litigation against the firearms industry if plaintiffs may invoke consumer-protection laws—the type of law relied on in *Soto*—as a means for shooting victims to seek compensation from the makers and distributors of firearms.

PLCAA: Congress enacted the [PLCAA](#) in 2005 to prohibit lawsuits against firearm and ammunition manufacturers, distributors, dealers, and importers, seeking recovery "for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." Accordingly, the PLCAA generally bars civil suits in federal or state court against those entities when a third party criminally uses a firearm or ammunition that has been shipped in interstate or foreign commerce. As a result, the PLCAA [preempts](#) some legal remedies that may be otherwise available to shooting victims under state law. Lawsuits are allowed, however, under the [following enumerated circumstances](#), beginning with the "predicate exception" at issue in *Soto*:

- Actions brought against a manufacturer or seller who knowingly violated a state or federal statute "applicable to" the sale or marketing of a firearm or ammunition, and the violation proximately caused the harm for which relief is sought, including
 - (1) when a manufacturer or seller knowingly makes a false entry, or fails to make an entry in, any record required to be kept under federal or state law, or
 - (2) when a manufacturer or seller aids, abets, or conspires with another person to transfer a firearm or ammunition while knowing, or having reasonable cause to know, that the actual buyer is prohibited from possessing or receiving a firearm under [18 U.S.C. § 922\(g\) or \(n\)](#);

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- Actions brought against a person who was convicted for transferring a firearm to another person knowing that other person would use it to commit a crime of violence or drug trafficking crime, and brought by a person directly harmed by the conduct for which the firearm transferee was ultimately convicted;
- Actions brought against a seller for negligent entrustment or negligence per se;
- Actions alleging breach of contract or warranty;
- Product liability actions stemming from design or manufacture defects;
- Actions brought by the Attorney General to enforce [Chapter 44 of Title 18](#) or [Chapter 53 of Title 26](#) of the U.S. Code. (These chapters generally contain the codification of the Gun Control Act and National Firearms Act, respectively.)

Soto v. Bushmaster Firearms International: Family members of several of the deceased victims of the Sandy Hook Elementary School shooting brought a [wrongful death lawsuit](#) under Connecticut law against the alleged dealer, distributor, and manufacturer of the Bushmaster XM15-E2S semiautomatic rifle (“Bushmaster”) used in the attack. The plaintiffs claim, among other things, that the defendants violated the [Connecticut Unfair Trade Practices Act](#) (CUTPA), which prohibits unfair or deceptive acts or practices in conducting commerce. The plaintiffs allege that the defendants advertised the Bushmaster in a manner that violated CUTPA by promoting “illegal offensive use of the rifle.” Plaintiffs contend, for example, that the defendants encouraged using the Bushmaster for “waging war and killing human beings,” as opposed to using the rifle for lawful purposes, such as hunting, target practice, or self-defense. The plaintiffs further allege that the defendants’ marketing contributed to the victims’ injuries because the assailant, who “had dreamed as a child” of joining the U.S. Army and thus was “especially susceptible to militaristic marketing,” had selected the Bushmaster, among other available firearms, to bring to Sandy Hook because of its marketed association with military use.

Because the defendants manufacture, distribute, and sell firearms, respectively, they are immune from civil litigation unless the lawsuit fits into one of the PLCAA’s exceptions. At issue in *Soto* is whether the lawsuit falls under the predicate exception, which allows suits for knowing violations of state law “applicable to” the sale or marketing of a firearm. In particular, the court was tasked with determining how broadly to construe that term: On one end of the interpretive spectrum, the term could reference laws that apply generally to the sale or marketing of products, including (but not limited to) firearms; on the other end of the spectrum, however, the term could be construed more narrowly to reference only those laws that expressly or exclusively regulate firearms.

The lower court dismissed the plaintiffs’ claims, but on appeal, a split Connecticut Supreme Court [concluded](#) that the plaintiffs stated a viable claim for relief, and so the plaintiffs may go forward with their lawsuit. In particular, the court adopted a broad view of the predicate exception, holding that CUTPA is a state law applicable to the sale or marketing of a firearm, and, thus, the defendants could not avail themselves of the PLCAA’s immunity. Turning first to the PLCAA’s text, the court reviewed dictionaries available at the time Congress enacted the statute and explained that “applicable” principally means “capable of being applied.” And CUTPA, the court continued, “is clearly capable of being applied to the sale and marketing of firearms.” The court rejected the defendants’ call for a narrower reading of the predicate exception—one that would limit its scope to statutes that directly, expressly, or exclusively apply to firearms—because, the court explained, “Congress is presumed to be aware that the wrongful marketing of dangerous items such as firearms for unsafe or illegal purposes traditionally has been and continues to be regulated primarily by consumer protection and unfair trade practice laws” like CUTPA, “rather than by firearms specific statutes.” The court further opined that the PLCAA emphasizes immunizing the firearms industry against liability “for harm that is *solely* caused by others.” Yet here, the court reasoned, the plaintiffs allege that the defendants’ marketing of the Bushmaster violated CUTPA and

directly caused the Sandy Hook shooting, and Congress never “indicat[ed] that firearm sellers should evade liability for injuries that result if they promote illegal use of their products.”

The [court](#) further reasoned that its reading of the PLCAA’s text is bolstered by the statute’s legislative history. The court explained that, during legislative debate, several PLCAA cosponsors stressed their intent to quash the rising number of lawsuits designed to harass and endanger the firearms industry. But, the court added, the legislation was not intended, as the bill’s principal sponsor remarked, to “bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry.”

Finally, the [court](#) opined that its interpretation of the predicate exception is consistent with that of the Second Circuit—the federal circuit in which the State of Connecticut sits and which is persuasive authority for Connecticut’s interpretation of federal law. In *City of New York v. Beretta U.S.A. Corp.*, the Second Circuit reviewed whether the PLCAA barred New York City from seeking a court order to abate an alleged public nuisance caused by the defendant firearm supplier’s distribution practices. Like the Connecticut court, the Second Circuit concluded that “nothing in the statute . . . requires any express language regarding firearms to be included in a statute in order for that statute to fall within the predicate exception.” Still, the Second Circuit clarified that the predicate exception “was meant to apply only to statutes that *actually regulate* the firearms industry.” In particular, the Second Circuit held that the predicate exception would apply to statutes that do not expressly regulate firearms if (1) courts have applied the statute to the sale and marketing of firearms, or (2) the statute “clearly can be said to implicate the purchase and sale of firearms.” The Second Circuit ultimately held that New York City’s criminal nuisance statute is a law of general applicability that does not fit into any of those two categories. But the Connecticut Supreme Court in *Soto* found that CUTPA was distinguishable from the law reviewed in *Beretta* and, indeed, fit into the Second Circuit’s enumerated categories. For instance, the Connecticut Supreme Court pointed to cases in which CUTPA had been applied to the sale of firearms.

The [dissent](#), by contrast, would have more narrowly construed the predicate exception to authorize lawsuits based only on laws that specifically govern the sale and marketing of firearms. Rejecting the Second Circuit’s analysis in *Beretta*, the dissent found more persuasive the Ninth Circuit’s reasoning in *Ileto v. Glock, Inc.* In *Ileto*, the Ninth Circuit evaluated whether victims of a shooting spree could sue under California’s codified tort law entities in the distribution chain for the seven firearms the assailant illegally possessed and used in the shooting. The Ninth Circuit announced that “[t]he purpose of the PLCAA leads us to conclude that Congress intended to preempt general tort law claims.” That preemption, the Ninth Circuit continued, extends to jurisdictions, like California, that have codified their tort regimes. Moreover, the Ninth Circuit pointed to the PLCAA’s opening findings that the “manufacture, importation possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws,” and so, according to the Ninth Circuit, it is “more likely that Congress had in mind only these types of statutes—statutes that regulate manufacturing, selling, marketing, and using firearms or that regulate the firearms industry.” The Ninth Circuit’s interpretation, in the dissent’s view, more accurately reflects the PLCAA’s text and legislative history, which “made very clear its intent to absolve defendants like these—gun manufacturers and distributors—from liability for criminal use of firearms by third parties except in the most limited and narrow circumstances.”

***Soto*, the PLCAA, and the Future of Litigation against the Firearms Industry:** *Soto*’s analysis of federal law involved the narrow task of determining the meaning of “applicable to” as the term is used in the PLCAA’s predicate exception. And while the state court’s ruling allows the suit to go forward, the factual record must be developed to show that the defendants actually violated CUTPA. Still, the ruling’s implications may be broad, by offering certain shooting victims (or surviving relatives) a potentially viable litigation strategy against members of the firearm industry through CUTPA-like consumer protection laws in other jurisdictions. Given that “[e]very state has a consumer protection statute more-or-less like Connecticut’s,” as two law professors recently explained, “[i]f courts in other states agree that the PLCAA exception is broad enough to preserve claims alleging violations of their consumer protection laws, this may create a substantial opening in the immunity firearm manufacturers enjoy.” Still, other courts faced with this question as an issue of first impression may ultimately adopt a view closer to the Ninth Circuit’s in *Ileto*.

If Congress disagrees with how the Connecticut Supreme Court—or the Second or Ninth Circuits, for that matter—interpreted the predicate exception, it could legislate to clarify its scope. Indeed, in its concluding remarks, the Connecticut Supreme Court proclaimed:

It is, of course, possible that Congress intended to broadly immunize firearms sellers from liability for the sort of egregious conduct that the plaintiffs have alleged but failed to express that intent in the language of [the] PLCAA or during the legislative hearings. If that is the case, and in light of the difficulties that the federal courts have faced in attempting to distill a clear rule or guiding principle from the predicate exception, Congress may wish to revisit the issue and clarify its intentions.

For similar reasons—i.e., that courts have not coalesced around a single interpretation of the predicate exception—it is possible that the U.S. Supreme Court will review the Connecticut Supreme Court’s ruling. Without Supreme Court or congressional intervention, the case will go back to the trial court for further proceedings. Even though *Soto* has gone all the way up to the Connecticut Supreme Court, the case is still in the early stages of the proceedings, as the parties have spent the last five years litigating whether the case may be litigated at all based on the facts alleged by the plaintiffs.

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